NO. 41534-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DERON ANTHONY PARKS,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

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2. The trial court denied the defendant an impartial jury under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when it permitted the state to elicit evidence that the mother of the complaining witness believed her son had been sexually assaulted.

3. The trial court erred when it imposed a community custody condition not authorized by law.

Issues Pertaining to Assignment of Error

1. Does a trial counsel's failure to object when the state elicits irrelevant, prejudicial evidence that a police officer believed the defendant was guilty and that the defendant had failed to speak with police officers deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and under United States Constitution, Sixth Amendment, when reasonable counsel would have objected to this evidence, the objections would have been sustained, and but for the admission of this evidence the jury would have acquitted the defendant?

2. Does a trial court deny a defendant an impartial jury under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when it permits the state to elicit evidence that the mother of the complaining witness believed her son had been raped, and when the jury would have acquitted but for the admission of this evidence?

3. Does a trial court err if it imposes community custody conditions not authorized by law?

STATEMENT OF THE CASE

Factual History

On October 1, 2009, Vancouver Police Officer Sandra Aldridge responded to a 911 call in which Deborah Thomas claimed that about 10 months previous her son Christopher Thomas had been sexually assaulted. RP 97. At the time, Christopher, who was born on January 1, 1993, was incarcerated in the Clark County Juvenile Detention facility on allegations that he had violated his probation from his most recent convictions for second degree assault and taking a motor vehicle without permission. RP 87. After receiving this report, Officer Aldridge went to the Juvenile Detention facility to speak with Christopher. RP 98. Initially, Christopher believed that Officer Aldridge was there to interrogate him about a burglary his brother Zach Thomas and their friend Tim Delisle had committed at the defendant Deron Parks' house. RP 86-87.

The burglary of the defendant's house had occurred on February 17, 2009, and the defendant had reported it to the police upon discovering what had happened. CP 48-49; RP 55-56. The day after making his initial report, the defendant again contacted the police and told them that a neighbor had reported hearing breaking glass the previous day and had seen two young men leaving the defendant's house. *Id.* The neighbor further reported having seen these two young men at the defendant's house on previous occasions. *Id.*

The defendant went on to tell the police that based on this information, he had walked down to a local skate park, and had confronted "Scottie" and "Tim," and they admitted committing the burglary. *Id.* According to the defendant, Christopher Thomas was also one of the young men he confronted at the skate park, and Christopher Thomas, along with the others, had threatened to "mess up his life" if he reported the burglary. RP 108-109.

Once Officer Aldridge explained to Christopher Thomas that she was there to talk about an alleged sexual assault with him as the victim and not about the burglary of the defendant's house, Christopher Thomas made his first claim to the police that the defendant had raped him. RP 98-99. According to Christopher, this assault occurred later one evening in either December of 2008 or 2007, after he had gone to celebrate his birthday at the house of a friend of the defendant's know to Christopher as "T." RP 65-68. Christopher claimed that the defendant and two females were present, that the defendant had given him beer, that he had drank too much and passed out, and that he had awoken to find the defendant anally raping him. RP 68-71. Christopher went on to claim that once he woke up, he went to the bathroom to urinate, that when he came out the defendant was gone, and that he had then ran home. RP 78-79. Finally, Christopher claimed that a few weeks later he told his brother's girlfriend Mariah Flennory what happened, that she had later told her mother, and that his claims had eventually made it to the

police. RP 81-82. Based upon Christopher's claims, Officer Aldridge also interviewed Mariah Flennory, as well as a number of other potential witnesses. RP 98.

Procedural History

By information filed July 29, 2010, the Clark County Prosecutor charged the defendant Deron Anthony Parks with one count of second degree rape against Christopher Thomas and one count of furnishing liquor to a minor. CP 1-2. The state also charged the defendant with indecent liberties without forcible compulsion against Tim Delisle and delivering a narcotic drug to Tim Delisle. *Id.* However, the court dismissed these two charges at the beginning of the jury trial in this case when Tim Delisle appeared pursuant to the prosecutor's subpoena, took the witness stand outside the presence of the jury and denied that the defendant had ever given him drugs or touched him in a sexual manner. RP 11-28.

Following the dismissal of the two counts involving Tim Delisle (II and III), the case proceeded to trial before the jury, with the state calling Mariah Flennory, Christopher Thomas, and Officer Sandra Aldridge as three of its four witnesses. RP 29, 60, 94. These witnesses testified to the facts included in the preceding factual history. *See* Factual History. In addition, the state called Detective Barry Folsom as a witness at trial. RP 47. Without objection from the defense, Detective Folsom testified to the following: (1)

that he was a Clark County Sheriff's Officer assigned to work with the "Children's Justice Center," (2) that for the past 10 years he had been assigned to investigate cases of physical and sexual abuse of children, (3) that he had been assigned to the Deron Parks case after Officer Aldridge had performed "extensive" interviews of the "victim" Christopher Thomas and other witnesses, and (4) that he had tried to interview the defendant but couldn't locate or contact him. RP 47-50.

At no point did the defense object that the testimony the state elicited from Detective Folsom was irrelevant, constituted improper opinion evidence of guilt, or commented on the defendant's exercise of his right to silence. RP 47-58. However, the last issue was not lost on the trial judge, who interrupted the prosecutor after she elicited the evidence that Detective Folsom had tried to contact the defendant but had been unable to get a statement from him. RP 49-50. Upon hearing this evidence, the court sent the jury out, and ordered the prosecutor to refrain from eliciting any more evidence that invited the jury to consider the defendant's failure to give a statement as evidence, lest the Court of Appeals reverse any potential conviction even without objection by the defense. RP 50-51.

However, while the defense did not object to the foregoing evidence from Detective Folsom, the defense did object when the state called upon Officer Aldridge to tell the jury what Deborah Thomas had claimed had

happened to her son. RP 97. However, the court overruled this objection, and allowed Officer Aldridge to tell the jury that Deborah Thomas had told her that her minor son Christopher Thomas "had been sexually assaulted." *Id.* In spite of the defendant's hearsay objection, the court did not give the jury any type of limiting instruction as to how they could consider this evidence. *Id.*

After the close of the state's case, the defendant took the stand on his own behalf and denied ever giving alcohol to Christopher Thomas or to ever touching him in a sexual manner. RP 102-118. He did testify that he had been present at his friend Tyler's house in December of 2008 on an occasion in which the defendant came over during the evening. RP 110-111. However, he denied seeing Christopher drink any alcohol, and he stated that when he left, Christopher and a number of other people were still present in the living room. *Id.*

After the close of the defendant's case, the state called Christopher Thomas for brief rebuttal. RP 120-121. The court then instructed the jury without objection from either party, and parties presented their closing arguments. RP 122, 123-135, 135-148. During deliberations in this case, the jury sent out a question concerning the language used in defining the furnishing alcohol to a minor charge, which was Count IV. CP 65. This question read as follows:

What does on any premises under his control mean?

CP 65.

The language "any premises under his control" was part of instruction number 10, which set out the elements of the furnishing charge. CP 62. The court responded to this question with the following statement to the jury:

> You will need to rely on the instructions given. I am unable to clarify further.

CP 65.

The record on appeal is silent as to the procedures the court used in formulating this reply. CP 71, 73. What is apparent from the record is that the jury retired for deliberation at 11:24:25 am and reconvened at 2:47 pm, as the transcriptionist notes on page 150 of the verbatim reports. *See* RP 150. In addition, it appears that the jury sent out its question at 11:45 am, as this time is written on that document. CP 65. However, neither the log sheet for the trial, nor the clerk's "In Court Record" state anything about the existence of the jury's question, much less the procedures the court used in answering it. *Id.* Thus, it is impossible to tell from the trial record or the record on appeal whether or not the court informed counsel or the defendant of the existence of the question and the answer. *Id.*

Following deliberation in this case, the jury returned verdicts of guilty on both counts. RP 150-153; CP 66-67. The court later imposed a sentence

of life in prison on the rape charge with a minimum mandatory time to serve within the standard range. CP 100-118. The court also sentenced the defendant to 365 days on the furnishing charge, concurrent to the sentence on the rape charge. CP 119-128. The court also imposed a number of community custody conditions on the felony charge, including the following:

> 11. You must consent to allow home visits by Department of Corrections to monitor compliance with supervision. This includes search of the defendant's person, residence, automobile, or other personal property, and home visits include access for the purposes of inspection of all areas the defendant lives or has exclusive/joint control or access. RCW 9.94A.631.

CP 115.

Following imposition of sentence, the defendant filed timely notice of appeal. CP 129-148.

ARGUMENT

I. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED IRRELEVANT, PREJUDICIAL EVIDENCE THAT A POLICE OFFICER BELIEVED THE DEFENDANT WAS GUILTY AND THAT THE DEFENDANT HAD FAILED TO SPEAK WITH POLICE OFFICERS DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNDER UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failures to object when (1) the state elicited evidence that a police officer believed the defendant was guilty and (2) when the state elicited evidence that the defendant had failed to speak with police officers. The following presents these arguments.

(1) Trial Counsel's Failure to Object When the State Elicited Evidence from a Police Officer that Christopher Thomas Was the "Victim" of the Defendant's Sexual Assault Denied the Defendant Effective Assistance of Counsel.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this fundamental constitutional guarantee to a fair trial, defense counsel, the

prosecutor, and the witnesses must refrain from any statements or conduct that expresses their personal belief as to the credibility of a witness or as to the guilt or innocence of the accused. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). If there is a "substantial likelihood" that any such conduct, comment, or questioning has affected the jury's verdict, then the defendant's right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

The constitutional principal that underlies the rule prohibiting a witness, whether a lay person or expert, from giving an opinion as to the defendant's guilt or innocence either directly or inferentially lies in the fact that "the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

> "[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); *see Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).
>
> The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the

> independent determination of the facts by the jury. *See Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701; *See also State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal the defendant argued that this testimony constituted an impermissible opinion concerning guilt, thereby violating the defendant's right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that "[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." *State v. Carlin*, 40 Wn.App. at 703.

Under this rule the fact that officers performed a "high risk" traffic stop, arrested the defendant, placed him in handcuffs, and took him to the

police station or the jail is not relevant evidence because it constitutes the arresting officer's opinions that the defendant is guilty. For example, in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), the plaintiff sued the defendant for injuries that occurred when the defendant's vehicle hit the plaintiff's vehicle. Following a defense verdict the plaintiff appealed arguing that defendant's argument in closing that the attending officers' failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. They agreed and granted a new trial.

> While an arrest or citation might be said to evidence the on-the-spot opinion of the traffic officer as to respondent's negligence, this would not render the testimony admissible. It is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge, when the opinion involves the very matter to be determined by the jury, and the facts on which the witness founds his opinion are capable of being presented to the jury. The question of whether respondent was negligent in driving in too close proximity to appellant's vehicle falls into this category. Therefore, the witness' opinion on such matter, whether it be offered from the witness stand or implied from the traffic citation which he issued, would not be acceptable as opinion evidence.

Warren v. Hart, 71 Wn.2d at 514.

Although a civil case, the decision in *Warren* illustrates the error in allowing direct or circumstantial evidence concerning the opinion of a witness as to the defendant's guilt or innocence, particularly when that witness is a government official such as a police officer. As the following explains, the state violated this constitutional prohibition in this case.

In the case at bar, the state elicited the following evidence from Detective Folsom during direct examination without any objection from the defense: (1) that he was a Clark County Sheriff's Officer assigned to work with the "Children's Justice Center," (2) that for the past 10 years he had been assigned to investigate cases of "physical and sexual abuse of children," (3) that had been assigned to the Deron Parks case after Officer Aldridge had performed "extensive" interviews of the "victim" Christopher Thomas. Indeed, Detective Folsom twice referred to Christopher Thomas as the "victim."

In this case, the defendant responded to the charges against him by taking the stand and denying any type of sexual contact with the complaining witness. This type of case in which the defense contests the existence of a crime can be contrasted with those in which the defense does not contest the fact of the crime, but does contest the defendant's involvement. For example, in the case of the drive-by shooting of an innocent bystander, a defendant would undoubtedly agree that the person shot was the "victim" of a crime, particularly if the defense was that some other person did the shooting. The point of comparing this hypothetical with the facts of the case at bar is to illustrate that there are cases in which the state's use of the term "victim," or the use of this term by a witness, does not convey an opinion that the defendant is guilty. However, in cases in which the accuser claims the

existence of a crime and specifically names the defendant as the perpetrator, a witnesses's characterization of the accuser as the "victim" unmistakenly informs the jury that in the opinion of the witness, the defendant is guilty. This error is grossly exacerbated in a rape case in which the witness is a police officer specially trained and with extensive experience investigating the very type of case before the jury. This is precisely what happened in the case at bar.

In other words, the ultimate issue for the jury to determine in the case at bar was whether or not Christopher was actually the "victim" of a crime. The case was not about who perpetrated that crime; it was about whether or not a crime had indeed occurred. Thus, in the case at bar, the officer's repeated characterization of Christopher Thomas as the "victim" forcefully conveyed his opinion to the jury both that a crime occurred, and that the defendant was the perpetrator. This error was exacerbated by the fact that the jury was also informed that Officer Detective Folsom was a Clark County Sheriff's Officer assigned to work with the "Children's Justice Center," that he had 10 years experience investigating cases of "physical and sexual abuse of children," and that he had only been assigned to the case after Officer Aldridge had performed "extensive" interviews.

One is left to ask the obvious question: What was the relevance of that fact that Detective Folsom was assigned to the "Children's Justice Center,"

that he had worked 10 years on cases involving "physical and sexual abuse of children," and that he got the case from Officer Aldridge after her "extensive" interviews of the "victim" and witnesses? The relevance in the eyes of the jury, and what the state wanted the jury to conclude, was that when Detective Folsom with his extensive experience tells you that Christopher Thomas was the "victim" of a sexual assault, you may be assured that the defendant was guilty of the crime charged.

No possible tactical reason exists for defense counsel's failure to object to such evidence. As a result, counsel's failure to object fell below the standard of a reasonable prudent attorney. In addition, this failure to object caused prejudice. This conclusion flows from the fact that the jury was asked to decide the case based solely upon the credibility of Christopher Thomas and the Defendant. No physical evidence supported the state's allegations and there were no witnesses to the alleged crime. In addition, no medical evidence was presented to support the state's claims. In such a situation, Detective Folsom's improper opinion that the defendant was guilty (unmistakenly communicated to the jury when he twice referred to Christopher Thomas as the "victim,") was the quantum of improper evidence that changed a probable verdict of acquittal on reasonable doubt to a verdict of guilt. Thus, trial counsel's failure to object caused prejudice and denied the defendant effective assistance of counsel under Washington Constitution,

Article 1, § 22, and United States Constitution, Sixth Amendment.

(2) Trial Counsel's Failure to Object When the State Elicited Evidence That the Defendant Failed to Meet with and Speak to the Police Denied the Defendant Effective Assistance of Counsel.

In the case at bar, the state elicited the fact that after the "extensive" interviews of the "victim" and witnesses, Officer Aldridge gave the case to Detective Folsom, who was unsuccessful when he tried to locate and contact the defendant in order to get a statement from him. Defense counsel did not object to this evidence. The error in failing to object to this evidence is that the evidence constituted a direct comment on the defendant's failure to cooperate with and talk to the police under circumstances in which a jury would have expected him to meet with the police and deny the allegations were he really innocent.

Given the fact that the defendant had no duty under either Washington Constitution, Article 1, § 9, or United States Constitution, Fifth Amendment, to speak to the police, the question arises as to the "relevance" of the testimony concerning the fact that the police officer tried to find and interview the defendant but was unable to do so. Under ER 401, "relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In other words, for evidence to be relevant, there must be a "logical nexus" between

the evidence and the fact to be established. *State v. Whalon*, 1 Wn.App. 785, 791, 464 P.2d 730 (1970). It must have a "tendency" to prove, qualify, or disprove an issue for it to be relevant. *State v. Demos*, 94 Wn.2d 733, 619 P.2d 968 (1980).

In the case at bar, the "logical nexus" between the defendant's apparent failure to respond to the officer and the facts at issue in this trial was that his failure to respond and speak to the police was a tacit admission of guilt that contradicted his later protestations of innocence. In other words, his initial failure to respond and speak in spite of the efforts by the officer to interview him is relevant because one can logically infer guilt from it, and this is precisely why the state elicited this evidence. The evidence has no other "relevance." The problem with this evidence is that while relevant, it was also highly prejudicial because it draws an inference of guilt from the defendant's exercise of his right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment. The following examines this issue.

The Fifth Amendment to the United States Constitution states that no person "shall ... be compelled in any criminal case to be a witness against himself." Washington Constitution, Article 1, § 9, contains an equivalent right. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71

S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). It also precludes the state from eliciting comments from witnesses or making closing arguments relating to a defendant's silence to infer guilt from such silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979).

> In *State v. Easter, infra*, the court states this proposition as follows: At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 473, 589 P.2d 789 (1979); *Miranda*, 384 U.S. at 461, 86 S.Ct. at 1620-21. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence. As the United States Supreme Court said in Miranda, "[t]he prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation." *Miranda,* 384 U.S. at 468 n. 37, 86 S.Ct. at 1624 n. 37. The purpose of this rule is plain. An accused's Fifth Amendment right to silence can be circumvented by the State "just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself." *State v. Fricks*, 91 Wash.2d 391, 396, 588 P.2d 1328 (1979).

State v. Easter, infra at 236.

For example, in *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996), the defendant was prosecuted for multiple counts of vehicular homicide. At trial, the state, in its case in chief, elicited testimony from its investigating officer that shortly after the accident, he found the defendant in the bathroom of a gas station at the intersection, and that the defendant "totally ignored" him when he asked what happened. The police officer also

testified that when he continued to ask questions, the defendant looked down, "once again ignoring me, ignoring my questions." Following conviction, the defendant appealed, arguing that this testimony violated his right to remain silent. The Washington Supreme Court agreed and reversed, stating as follows:

> Accordingly, Easter's right to silence was violated by testimony he did not answer and looked away without speaking when Officer Fitzgerald first questioned him. It was also violated by testimony and argument he was evasive, or was communicative only when asking about papers or his friend. Moreover, since the officer defined the term "smart drunk" as meaning evasive behavior and silence when interrogated, the testimony Easter was a smart drunk also violated Easter's right to silence.

State v. Easter, 130 Wn.2d at 241.

The evidence in the case at bar is analogous. In *Easter*, the defendant repeatedly refused to answer the officer's questions, while in the case at bar, the defendant apparently was able to elude the repeated efforts from the officer to find and interview him. By eliciting this evidence, the state invited the jury to infer guilt from the defendant's refusal to cooperate with the officers. No reasonable defense counsel would fail to object to the state's actions in eliciting evidence concerning the defendant's exercise of such a fundamental constitutional right. Thus, trial counsel's failure to object fell below the standard of a reasonably prudent attorney.

In addition, this evidence also caused prejudice to the defendant,

particularly given trial counsel's failure to see a limiting instruction from the court. Given the defendant's prior repeated contacts with the police concerning the burglary at his house, it would appear obvious to the jury that the reason the officer was unable to find and interview the defendant on the allegations of sexual assault was that the defendant was purposely avoiding contact with the officer because he knew he was guilty. This evidence was particularly onerous in this case because of the dearth of any evidence to support the claims of the complaining witness. In such a case in which the question before the jury is solely one of credibility, the admission of this evidence impinging upon the defendant's right to silence was more than sufficient to change a verdict of acquittal to one of conviction, as it did in this case. Thus, trial counsel's failure to object or request a limiting instruction denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

II. THE TRIAL COURT DENIED THE DEFENDANT AN IMPARTIAL JURY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT PERMITTED THE STATE TO ELICIT EVIDENCE THAT THE MOTHER OF THE COMPLAINING WITNESS BELIEVED HER SON HAD BEEN RAPED.

As was stated in the preceding section, under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth

Amendment, both defense counsel and the prosecutor, as well as the witnesses, must refrain from any statements or conduct that expresses their personal belief as to the credibility of a witness or as to the guilt of the accused. *State v. Case*, *supra*. In this case, the state violated this constitutional prohibition when it elicited evidence from Officer Aldridge that Deborah Thomas told her that her son Christopher Thomas had been sexually assaulted. RP 97.

As was stated in the preceding section, one is left to ask what the relevance of this evidence was. In this case, the state may argue that the purpose of this evidence was to explain to the jury why Officer Aldridge made her initial contact with Christopher Thomas. While this might be true, the fact is that why Officer Aldridge made her initial contact with Christopher Thomas was not a fact at issue at trial. As a result, it was irrelevant under ER 401.

However, while not relevant to a fact at issue at trial, this evidence was highly prejudicial and expressed Deborah Thomas's opinion that her son was the victim of a sexual assault. This evidence violated the defendant's right to an impartial jury. In addition, as was mentioned above, the ultimate question before the jury in this case was solely one of credibility between Christopher Thomas and the defendant. In such a case without any corroborating evidence, this improper, prejudicial opinion evidence was

sufficient to change a verdict of acquittal to a verdict of guilt. Thus, the defendant is entitled to a new trial.

III. THE TRIAL COURT ERRED WHEN IT IMPOSED A COMMUNITY CUSTODY CONDITION NOT AUTHORIZED BY LAW.

In Washington, the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937).

For example, in the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the court of appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that alcohol or mental health problems contributed to the

defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims, the court of appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes in RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were "reasonably related" to the defendant's commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

In the case at bar, the defendant argues that the trial court exceeded it's statutory authority when it imposed the following community custody condition not authorized by the legislature:

> 11. You must consent to allow home visits by Department of Corrections to monitor compliance with supervision. This includes search of the defendant's person, residence, automobile, or other personal property, and home visits include access for the purposes of inspection of all areas the defendant lives or has exclusive/joint control or access. RCW 9.94A.631.

CP 115.

Under this condition, the court has required the defendant to

"consent" to searches of his "person, residence, automobile, or other personal property, and home" as a requirement of his community custody. The final reference to RCW 9.94A.631 appears to be a claim that the legislature has authorized this community custody condition. In fact, a review of RCW 9.94A.631 does not support this conclusion. This statute states:

> (1) If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or a department of corrections hearing officer. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.
>
> (2) For the safety and security of department staff, an offender may be required to submit to pat searches, or other limited security searches, by community corrections officers, correctional officers, and other agency approved staff, without reasonable cause, when in or on department premises, grounds, or facilities, or while preparing to enter department premises, grounds, facilities, or vehicles. Pat searches of offenders shall be conducted only by staff who are the same gender as the offender, except in emergency situations.
>
> (3) A community corrections officer may also arrest an offender for any crime committed in his or her presence. The facts and circumstances of the conduct of the offender shall be reported by the community corrections officer, with recommendations, to the court or department of corrections hearing officer.
>
> If a community corrections officer arrests or causes the arrest of an offender under this section, the offender shall be confined and detained in the county jail of the county in which the offender was taken into custody, and the sheriff of that county shall receive and keep in the county jail, where room is available, all prisoners delivered to the jail by the community corrections officer, and such offenders shall not be released from custody on bail or personal

> recognizance, except upon approval of the court or authorized department staff, pursuant to a written order.

RCW 9.94A.631,

The only mention of searches in this statute is in part (2), in which the legislature states that for the "safety and security of department staff," a probationer may be required to submit "to pat searches, or other limited security searches," without reasonable cause, but only when the defendant is "on department premises, grounds, or facilities." This statute does not purport to require a person on community custody to "consent" to a "search of the defendant's person, residence, automobile, or other personal property," at the discretion of the Department of Corrections. Thus, the legislature has not authorized the courts to impose this condition. In addition, as the following points out, any such condition would violate both Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

Under Article 1, § 7 of the Washington Constitution, as well as under the Fourth Amendment to the United States Constitution, warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets it burden of proving that the search falls within one of the various "jealously

and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988). One exception to the warrant requirement allows probation officers to search the homes and persons of probationers without a warrant. *State v. Rainford*, 86 Wn.App. 431, 438, 936 P.2d 1210 (1997). In addition, while most arrests and searches may only be made upon probable cause, our courts have reduced the probable cause requirement for the arrest, search, or issuance of warrants for defendants who have already been adjudicated guilty. *State v. Lucas*, 56 Wn.App. 236, 783 P.2d 121 (1989). Thus, for example, a probation or police officer may arrest or search without a warrant, or by inference, the court may issue a warrant to arrest based upon a probation or police officer's "reasonable belief" that an offender has violated his or her conditions of probation or conditions of release pending sentencing. *State v. Simms*, 10 Wn.App 75, 516 P.2d 1088 (1974).

For example, in *State v. Fisher*, 145 Wn.App. 206, 35 P.3d 366 (2001), the defendant pled guilty to a drug charge and the court released her upon conditions pending sentencing. Prior to the sentencing hearing, the same court issued a warrant for the defendant's arrest upon the state's affidavit alleging that the defendant had violated the court's conditions of release. Upon execution of the warrant and a search incident to that arrest, the police found drugs on the defendant's person. The state then charged the

defendant with possession of the drugs found upon her arrest on the bench warrant. Following this charge, the defendant moved to suppress the evidence seized upon an argument that the state's affidavit did not establish probable cause to believe that she had violated her conditions of release.

The trial court eventually denied the defendant's motion, holding that while the state's affidavit did not establish probable cause, it did establish a "well-founded suspicion" to believe that the defendant had violated her conditions of release. The defendant was later found guilty after a jury trial, and she appealed, arguing that the trial court had erred when it denied her motion to suppress. However, the Court of Appeals affirmed, holding that the warrant was properly issued under CrR 3.2(j) upon the state's allegation that she had violated her conditions of release. After this ruling, the defendant sought and obtained review before the Washington Supreme Court.

Before the Supreme Court, the defendant argued that to the extent the court rules allow the issuance of an arrest warrant on less than probable cause (*i.e.*, reasonable suspicion), they violate Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. In the alternative, the defendant argued that the prosecutor's affidavit failed to meet the reliability and specificity requirements of those same constitutional provisions, which is an implied requirement of the "reasonable suspicion" standard (should that standard apply).

In analyzing these arguments, the court first recognized a dichotomy in our constitutional law between the privacy rights of an "accused" person as opposed to the privacy rights of a person who has already been "convicted." The former is entitled to protection under the "probable cause" standard, while the latter is only entitled to the protection of the "reasonable suspicion" standard, provided the information given in support of the claim of violation meets the reliability and specificity requirements of Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment. The court stated as follows on this point.

> Our Court of Appeals cases suggest that an exception to the probable cause requirement exists when a defendant adjudged "guilty" of a felony is released with specified conditions. Although those cases questioned the constitutionality of RCW 9.94A.195 permitting searches without probable cause, that statute, like CrR 3.2(j)(1), also provides for arrest without determination of probable cause. In upholding the constitutionality of RCW 9.94A.195, the Courts of Appeal in Lucas and Massey have ruled that "search and seizure of [probationer's or parolee's] person" only requires a showing of reasonable cause and not probable cause. Thus, the lower standard, reasonable cause, satisfies the Fourth Amendment when a bench warrant is issued for a convicted felon who has been released subject to conditions. This undermines Petitioner's argument that the Fourth Amendment requires probable cause for issuance of a bench warrant.
>
> Respondent is correct in its contention that a "well-founded suspicion" that violation of a condition of release has occurred should be required for the court to issue a bench warrant under CrR 3.2(j)(1) for persons who have pleaded "guilty" to a felony and await sentencing. Under the facts in this case, the rule must be read together with CrR 3.2(f).

State v. Fisher, 145 Wn.2d at 228-229.

As the court explained, a "convicted" person, whether sentenced or not, has a reduced expectation of privacy that allows the state to obtain a warrant of arrest on "reasonable suspicion" even though the specific language of the Fourth Amendment requires the existence of probable cause. Thus, the court proceeded to the defendant's alternative argument that the prosecutor's affidavit did not establish a "reasonable suspicion" to believe she had violated her conditions of release. In this argument, the court agreed with the defendant, holding as follows:

> The arrest of Petitioner Fisher under the bench warrant in this case was not reasonable because the State in its application for the bench warrant did not provide specific and articulable facts of a willful violation of any condition of her release pending sentencing. The Fourth Amendment requires, at a minimum, that the information the officer relies upon at least carry some indicia of reliability. ***The application and affidavit submitted in support of the bench warrant for arrest of Petitioner did not provide any indicia of reliability or specificity that Petitioner had violated any condition of her release.*** There was at best a vague suggestion that she might have violated the condition that she "have no violation of any criminal laws." But there is absolutely no indication of what laws, if any, she might have violated. The simplest test is to ask the question, "what condition of her release does the State in its application claim was violated by Petitioner Fisher?" From the record in this case, the answer can only be "none," even applying the "well-founded suspicion" standard.

State v. Fisher, 35 P.3d at 376-377 (footnotes omitted) (emphasis added).

As the court in *Fisher* clarifies, a warrant may issue for the arrest of a "convicted" person upon a "reasonable suspicion" that the person has

violated the terms of his or her judgment and sentence, in spite of the fact that the literal language of the Fourth Amendment requires the existence of "probable cause." In addition, while the level of proof for a probationer is reduced, the government agent performing the search must still have a "reasonable suspicion" that the contraband the defendant is suspected of possessing will be in the place to be searched. Thus, any legislative enactment that authorizes the search of a probationer's person, vehicle, or home based upon less than a "reasonable suspicion" would violate both Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

In a number of prior cases, the Court of Appeals has ruled that constitutional arguments such as this are not ripe for decision given the fact that the state had not sought to sanction the defendant for violation of any of the conditions the defendant herein claims are improper. *See State v. Motter*, 139 Wn.App. 737, 162 P.3d 1190 (2007); *State v. Massey,* 81 Wn.App. 198, 913 P.2d 424 (1995) (Claim of defendant who was sentenced to community supervision that sentencing court erred by ordering him to submit to searches without stating that search must be based on reasonable suspicion was premature as defendant was not subjected to any searches which defendant deemed unreasonable). In *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008), the Washington Supreme Court reversed these decisions. The

following examines this case.

In *Bahl, supra,* the defendant appealed community custody conditions imposed following his conviction for second degree rape, arguing that they were void for vagueness. These conditions prohibited the defendant from possessing "pornographic materials" and "sexual stimulus material." The state responded, in part, that since the defendant was still in prison and DOC was not trying to enforce these conditions, the defendant's constitutional vagueness challenge was not yet ripe.

In addressing the ripeness question, this court relied heavily upon the analysis of the Third Circuit Court of Appeals' decision in *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001). In *Loy*, the government argued that the court should refrain from reviewing a defendant's vagueness challenge to his probation conditions prior to a claim that the defendant had violated one of those conditions. Specifically, the government argued that "because vagueness challenges may typically only be made in the context of particular purported violations, [the defendant] must wait until he is facing revocation proceedings before he will be able to raise his claim." *Loy, supra.*

In addressing this argument, the court first noted that the other circuit courts of appeal uniformly allow defendants to challenge conditions of probation on direct review. Indeed, the failure to do so could well be seen as a waiver of the right to object. Second, under the "prudential ripeness

doctrine" in which the court addresses the hardship that will arise from refusing to review a challenged condition of probation, the court found that failure to address a vagueness argument would cause hardship to the defendant. Specifically, the court noted "the fact that a party may be forced to alter his behavior so as to avoid penalties under a potentially illegal regulation is, in itself, a hardship." *U.S. v. Loy*, 237 F.3d at 257. In addition, the court noted that a defendant should not have to "'expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.'" *Id.* (quoting *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)). Finally, under the "fitness for judicial review" doctrine, the court in *Loy* noted that the vagueness challenge to the probation condition in question was almost exclusively a question of law. As such, it was particularly ripe for review.

After reviewing the *Loy* decision, this court held that a defendant could make a vagueness challenge to community custody conditions as part of a direct appeal if the challenge meets the "ripeness doctrine." This court held:

> For many of the same reasons that the court held in *Loy* that the defendant there could bring his preenforcement vagueness challenge, we hold that a defendant may assert a preenforcement vagueness challenge to sentencing conditions if the challenge is sufficiently ripe. First, as noted, such challenges have routinely been reviewed in Washington without undue difficulty. Second, preenforcement review can potentially avoid not only piecemeal review but can also avoid

> revocation proceedings that would have been unnecessary if a vague term had been evaluated in a more timely manner. Third, not only can this serve the interest of judicial efficiency, but preenforcement review of vagueness challenges helps prevent hardship on the defendant, who otherwise must wait until he or she is charged with violating the conditions of community custody, and likely arrested and jailed, before being able to challenge the conditions on this basis.

State v. Bahl, at 12.

This court then went on to note that under the "ripeness doctrine," the court applies the following four criteria for determining whether or not a vagueness challenge is sufficiently ripe for judicial review:

> (1) Whether or not the issue the defendant argues is primarily legal or not;
>
> (2) Whether or not the record requires further factual development for an adequate review;
>
> (3) Whether or not the challenged action is final; and
>
> (4) Whether or not withholding the court's consideration will create a hardship to the parties.

State v. Bahl, at 12-13.

In addressing these criteria in *Bahl*, the court had little difficulty in finding that the defendant's vagueness challenge was sufficiently ripe. Under the first two factors, the court found that the defendant's argument was primarily legal in nature and did not require the application of any particular set of facts in order to determine its application. Under the third factor, the conditions the defendant challenged were "final" since they were made a part

of the sentence imposed by the court. Under the fourth factor, the imposition of the conditions upon the defendant's release would cause the defendant hardship at the time of his release, regardless of DOC's enforcement efforts. This would be because, as in *Loy*, the defendant would immediately upon release have to alter his conduct in an attempt to conform with potentially vague conditions, and he would have to live in constant fear of arrest and incarceration upon a violation of what could ultimately be held to be an unconstitutional requirement. Thus, in *Bahl*, the court held that the defendant's challenge to his community custody conditions was "ripe for determination."

In *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010), the Washington Supreme Court went on to clarify the decision in *Bahl*. In *Valencia*, the court of appeals held that *Bahl* only allowed pre-enforcement review of community custody conditions that affected a defendant's rights under the First Amendment. The Washington Supreme Court rejected this argument, holding as follows:

> In *Bahl*, the State conceded that the condition at issue " 'arguably' concern[ed] First Amendment rights," a concession the Court of Appeals in this case found it significant. It thus distinguished the petitioners' challenge on the ground that no such rights are implicated here. But our ripeness analysis in *Bahl* did not rest on singling out a First Amendment challenge as unique, as the Court of Appeals seemed to believe. Rather, we applied a general, prudential ripeness test, emphasizing that courts routinely entertain preenforcement challenges to sentencing conditions. Only upon

> turning to the merits of *Bahl's* vagueness claim did we find the First Amendment context significant, noting that the context requires "'a heightened level of clarity and precision'" in defining proscribed conduct. But in determining whether review of the imposed condition was ripe, we did not find the First Amendment implication significant. The fact that no party has argued a First Amendment violation in this case is therefore of no relevance to whether this case is ripe for review.

State v. Valencia, 169 Wn.2d at 787-788.

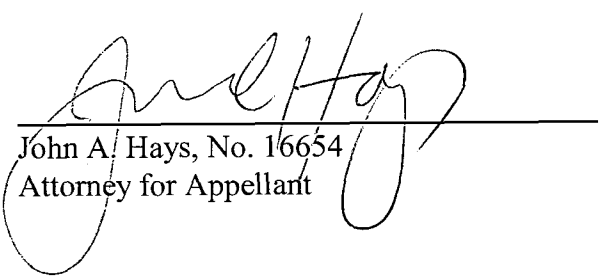
In the case at bar, the defendant's preenforcement challenge to the community custody condition allowing searches on less than a reasonable suspicion meets the criteria set out in *Bahl*. First, the issue that appellant raises is solely a legal question. Second, there is no need for "further factual development" to ensure adequate appellant review. Third, the court's imposition of the challenged community custody condition as part of those conditions required under the judgment and sentence is a final ruling by the court. Finally, there is a high probability that this court's refusal to review this condition will create a hardship for the defendant because once released, he will be required by the community custody condition to waive his constitutional right as a convicted offender under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, to be free from searches on less than a reasonable suspicion. Thus, appellant meets the requirements for preenforcement review under *Bahl*.

CONCLUSION

Trial counsel's failure to object to the admission of irrelevant, prejudicial evidence denied the defendant effective assistance of counsel. In addition, the trial court denied the defendant a fair trial when it allowed a witness to express an opinion that the defendant was guilty. As a result, this court should reverse the defendant's conviction and remand for a new trial. In the alternative, the court should strike the community custody condition unauthorized by the legislature.

DATED this 2nd day of June, 2011.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 7

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 9

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

WASHINGTON CONSTITUTION
ARTICLE 1, § 21

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9.94A.631
Violation of Condition or Requirement of Sentence – Security Searches Authorized – Arrest by Community Corrections Officer – Confinement in County Jail

(1) If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or a department of corrections hearing officer. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

(2) For the safety and security of department staff, an offender may be required to submit to pat searches, or other limited security searches, by community corrections officers, correctional officers, and other agency approved staff, without reasonable cause, when in or on department premises, grounds, or facilities, or while preparing to enter department premises, grounds, facilities, or vehicles. Pat searches of offenders shall be conducted only by staff who are the same gender as the offender, except in emergency situations.

(3) A community corrections officer may also arrest an offender for any crime committed in his or her presence. The facts and circumstances of the conduct of the offender shall be reported by the community corrections officer, with recommendations, to the court or department of corrections hearing officer.

If a community corrections officer arrests or causes the arrest of an offender under this section, the offender shall be confined and detained in the county jail of the county in which the offender was taken into custody, and the sheriff of that county shall receive and keep in the county jail, where room is available, all prisoners delivered to the jail by the community corrections officer, and such offenders shall not be released from custody on bail or personal recognizance, except upon approval of the court or authorized department staff, pursuant to a written order.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,**	**NO. 41534-8-II**
vs.	**AFFIRMATION OF SERVICE**
DERON ANTHONY PARKS, **Appellant.**	

STATE OF WASHINGTON)
) : ss.
County of Clark)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On June 2nd , 2011, I personally placed in the mail the following documents

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

to the following:

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DERON A. PARKS #344051
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Dated this 2ND day of JUNE, 2011 at LONGVIEW, Washington.

Cathy Russell

CATHY RUSSELL
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